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MONTANA PROSECUTOR

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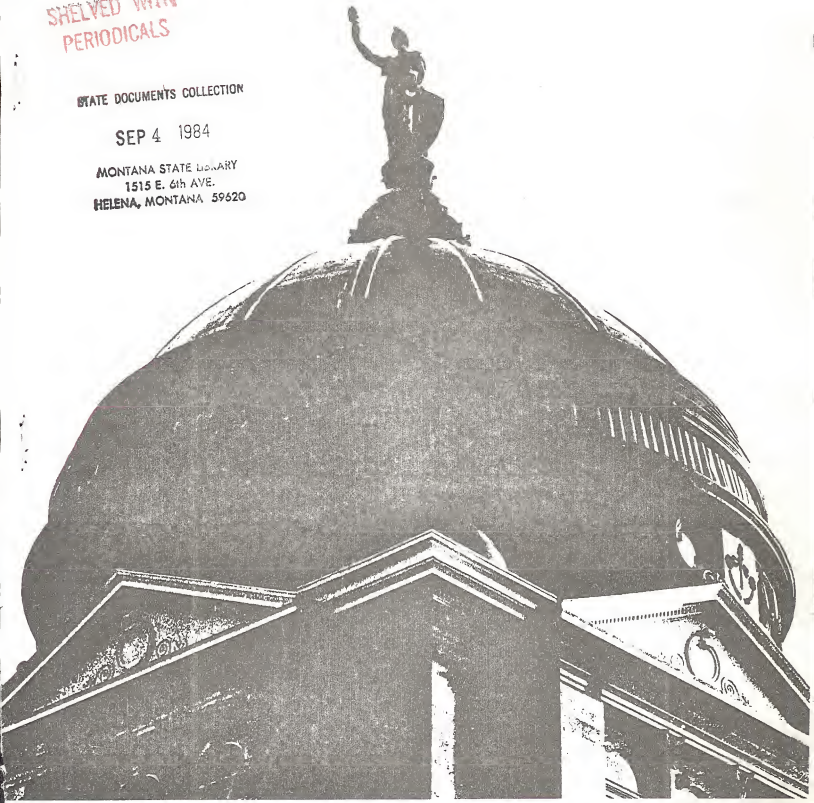

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INTRODUCTORY NOTES AND COMMENTS

ELECTION AND COMMITTEE ASSIGNMENTS

At the annual MCAA convention at the Outlaw Inn from July 25 to July 28, 1984 the following persons assumed the offices or assignments designated as a result of election or appointment and will hold such offices until the 1985 convention:

Officers

John Pratt - President
John Flynn - 1st Vice-President
Ed Laws - 2nd Vice-President
Bob McCarthy - 3rd Vice-President
Don Ranstrom - Treasurer
Ted Lympus - Secretary

Board of Directors

Allin Cheetham
Dick Simonton
Russ Andrews
Loren Tucker
Denzil Young
John Forsythe

Legislative Committee

Ed Laws - Chairman
Rae Kalbfleisch
Harold Hanser
Ed McLean
Mike McGrath

Training Committee

Marc Racicot
MCAA Officers

Convention Site Committee

John Pratt
Ron Smith
Craig Buehler

Jail Standards Committee

Russ Andrews
Loren Tucker
Allin Cheetham

Gambling Committee

Don Ranstrom
Loren Tucker
Duke Gilbert

ELECTION AND COMMITTEE ASSIGNMENTS (CONT.)

Nominations Committee

Denzil Young	Ed Laws
Rae Kalbfleisch	

Handbook Committee

Gerry Higgins	Dusty Deschamps
Duke Gilbert	

Wine Committee

Ed Laws	John Pratt
Bob McCarthy	

Salary Committee

Ted Lympus	Bob McCarthy
Willis McKeon	John Flynn
John Conner	Dusty Deschamps, Chairman

Task Force On Victims' And Witnesses' Rights

X

LEGISLATION

Legislative suggestions are solicited by the Legislative Committee and should be mailed to County Prosecutor Services Bureau, Justice Building, 215 North Sanders, Helena, Montana 59620. The Legislative Committee will meet on September 21, 1984 to consider proposed legislation.

CRIMINAL JUSTICE CONFERENCE III

The conference is sponsored by the Montana Board of Crime Control and is being held on October 10 and 11, 1984 at the Colonial Inn in Helena. It will focus on proposed legislation that will impact the criminal justice system. Members of the entire criminal justice community are invited to attend and participate.

AMERICAN PROSECUTORS RESEARCH INSTITUTE

Included herein is a notice announcing two positions with the American Prosecutors Research Institute, a newly established national nonprofit justice institute. Applications for the positions are now being solicited.

FALL TRAINING SEMINAR

The Fall Training Seminar will be held on December 13 and 14, 1984 in Billings at the Sheraton. It is the desire of many of the county attorneys that the training, or a portion of it, focus upon the civil duties of the county. Any assistance or suggestions you might have in that regard would be apprecitated.

NDAA Report

The report of Denzil Young, NDAA Director for the Association is included for your review.

LAW ENFORCEMENT QUARTERLY

The Montana Law Enforcement Quarterly invites county attorneys and their deputies to submit for publication materials of interest to Montana law enforcement agencies. Materials should be sent to Ron Smith, Hill County Attorney, Havre, Montana 59501.

AMERICAN PROSECUTORS RESEARCH INSTITUTE

A newly-established, national, nonprofit criminal justice institute, headquartered in the Washington D.C. area with an initial operating budget of $1.5 million, is seeking qualified candidates for the following two senior staff positions:

VICE PRESIDENT
PLANNING & DEVELOPMENT

Reporting directly to the president of the institute, the successful candidate must possess a strong background in development as well as a working knowledge of the criminal justice system. Public relations experience is preferred. The successful applicant will be required to develop and pursue a sound funding strategy aimed at the private sector and governmental sources, including conceptualizing and preparing criminal justice-oriented program funding proposals. Excellent interpersonal and communication skills are essential. Salary commensurate with proven ability.

DIRECTOR
CRIMINAL JUSTICE RESOURCE CENTER

Candidates must possess strong organizational, administrative, and supervisory skills as well as an intimate knowledge of the criminal justice system, particularly the prosecutorial function. Superior writing skills are essential. The Director will be responsible for supervising staff attorneys and researchers, participating in such activities as analyzing and evaluating computer hardware and software systems as they relate to the prosecutorial function, the delivery of technical assistance in the area of prosecutorial office management, and the preparation of articles and monographs on subjects of importance to prosecutors. Salary commensurate with experience.

For immediate consideration please forward your resume, complete with salary history and references, to:

American Prosecutors Research Institute
708 Pendleton Street
Alexandria, VA 22314

Denzil R. Young
P. O. Box 620
Baker, Montana · 59313
Fallon County Attorney
Area Code 406
Telephone No. 778-2406

May 31, 1984

Montana County Attorneys Association
c/o County Prosecutor Services Dept.
Justice Building, 215 N. Sanders
Helena, Montana 59620

Dear County Attorneys & Staff Members:

I attended both the Longboat Key, Florida Board of Directors meeting of the NDAA on November 18 & 19, 1983, and the subsequent board meeting which was our legislative conference in Washington, D.C., May 6-9, 1984. Both meetings were very worthwhile. I continue to be amazed, as I was during my previous 3 year tenure as your director on the NDAA Board, at the amount of business handled in a very short space of time at these board meetings.

It was a pleasure to renew acquaintances with the other directors and staff whom I had known previously. There are many very active committees which really are productive and are responsible for the success of the NDAA program.

Our final day in Washington, D.C. saw Edward Kennedy addressing our closing breakfast meeting and after he spoke, he came around and met everyone present. This was an interesting experience.

I have made a much more detailed report of these meetings to the President and Board of Directors of the Montana County Attorneys Association and will be glad to provide the membership with copies of this 4 page report upon request. It just seemed to me that perhaps a lengthy report remarking upon the various committee meetings and the action taken at our business sessions might well simply take up pages in our MONTANA PROSECUTOR and go largely unread so it will be better to make a capsule report for such publication and send copies of my longer report to our Association officers.

Very truly yours,

Denzil R. Young
Fallon County Attorney
Box 620, Baker, Mt. 59313

Montana Director of NDAA

RECENT CASES AND NOTES

SEARCH WARRANTS - PROBABLE CAUSE - GETAWAY CAR - ILLINOIS V. GATES

Where an affidavit stated "that a vehicle matching eyewitnesses' description of a getaway car used by two males in an armed robbery was parked in the driveway of its owner, a female, [it] provided probable cause for a state judge's issuance of a search warrant for the residence as well as the vehicle ... The magistrate could reasonably infer that during the hours between the robbery and the discovery of the car, the robbers would remove the large quantity of stolen cash and checks from the vehicle and secrete it in a residence - especially since the police were known to have a good idea of the car's appearance. Furthermore, the presence of the vehicle in the driveway of its owner established a nexus between the offense and the occupants of the house that removed them from the category of innocent householders protected by the Fourth Amendment." U.S. v. Travisano, 724 F.2d 341 (2nd Cir., 1983).

PLAIN VIEW DOCTRINE - AERIAL SURVEILLANCE

Balancing a defendant's reasonable expectations of privacy against the plain view doctrine as applied to aerial surveillance by law enforcement authorities, it has been held that no warrant is necessary for law enforcement overflights of a marijuana field located in a rugged and isolated rural area. In tipping the scale in favor of application of the plain view doctrine (or "plane view," as the Court notes), the Court stated: "[I]t is difficult to sustain the concept of a reasonable expectation of privacy due to the other private and official flights passing over the land. * * * The only practical method of law enforcement and assistance [in rural areas] is through the use of aircraft patrol. Under these circumstances an airborne law officer is in no different posture than his counterpart patrolling public streets in an urban area." People v. Mayoff, 197 Cal. Rptr. 450 (Cal. App., 1983).

DWI - PER SE

California's DWI statute, making it unlawful per se to drive with a blood alcohol level of 0.10 percent or more, has been upheld by the California Supreme Court against arguments that it was vague and beyond the scope of the legislature's police power. Burg v. Municipal Court, 673 P.2d 732 (Cal., 1983).

SALE OR POSSESSION OF COUNTERFEIT CONTROLLED SUBSTANCES

A statute proscribing sale or distribution of "counterfeit controlled substances" is not unconstitutionally vague where it defines the prohibited item as a substance that is represented to be a controlled substance and whose nature, packaging, or appearance would "lead a reasonable person" to believe that it is what it is represented to be. The Court rejected an argument that reasonable people do not use real drugs and so would not know what they look like. All that is required under the statute is that the State prove that the item "looks reasonably like a controlled substance," a finding that a trial jury should be able to make. People v. Moore, 674 P.2d 354 (Colo., 1984).

IDENTIFICATION EVIDENCE - VIDEOTAPED LINEUP - RIGHT TO COUNSEL

A defendant does not have a right to have counsel present when a videotape of his lineup is shown to eyewitnesses who missed the live lineup, even though the videotape of the lineup is shown after a complaint has been filed and the defendant has appeared before a magistrate. Here, the original lineup was held before the initiation of formal charges. The Court takes the position that a videotape showing is more like a photographic array than an actual lineup, and an attorney can do little at the videotape showing. On the other hand, counsel can use the videotape to reconstruct the lineup and attack the credibility of a witness's in-court identification testimony. U.S. v. Amrine, 723 F.2d 84 (8th Cir., 1983).

BLOOD TESTS - STATUTORY RIGHT TO ADDITIONAL TESTS - POLICE REFUSAL TO TRANSPORT TO HOSPITAL

Where a defendant had a statutory right to an additional chemical test after his arrest for DWI, a refusal by police officers to transport him to a hospital some seven miles from the station in order that he might exercise this right was reasonable, where the police offered to arrange for a licensed physician's assistant to obtain a "kit" and visit the jail to draw a blood sample (the defendant declined), the defendant was given proper advisement of his rights, and had unrestricted access to the telephone. Although the police conduct in this case was reasonable, the Court warned that its conclusion was "not to be construed as a per se rule that refusal to transport a defendant to the hospital for a blood test, under all circumstances, is reasonable." State v. Reed, 672 P.2d 1277 (Wash. App., 1983).

MENTAL CONDITION - EXERCISE OF MIRANDA RIGHTS

Evidence that a defendant who raises an insanity defense exercised his Miranda rights is inadmissible on the issue of his mental condition. The Court takes the position that a contrary rule would violate the spirit and letter of Miranda's assurance that a suspect will not be penalized for exercising his rights. Additionally, the court was of the view that such testimony is neither probative of, nor relevant to, the issue of a defendant's sanity. State v. Burwick, 442 So.2d 944 (Fla., 1983).

HEARSAY - MEDICAL DIAGNOSIS

Statements made by a four-year-old victim to medical personnel during a medical examination were admissible at the defendant's trial for child abuse under a hearsay-rule exception for statements reasonably pertinent to medical diagnosis or treatment. Although this holding runs counter to the general rule against admission of hearsay statements involving the critical issue of fault, the Court found the State's interest in protecting children to be paramount, and also believed the evidence was relevant because of a statutory duty of physicians to report cases of suspected child abuse. Goldade v. State, 674 P.2d 721 (Wyo., 1983).

PROSECUTING ATTORNEY - IMMUNITY - ARGUMENT - DISCRETION

A prosecutor was absolutely immune from a claim under 42 U.S.C.A. §1983 brought by a complaining witness in a criminal case who claimed that he violated her constitutional rights by incarcerating her when she failed to appear at trial after telling him she wanted to drop the charges. As it turned out, the charges in the criminal case were dismissed when the witness exercised her privilege against self-incrimination. It made no difference that the plaintiff in the 1983 action had been merely a witness in the prior proceedings, rather than a defendant, the Court finding "no ground for a distinction which would protect a prosecutor from liability for damages where he had obtained a conviction through subornation of perjury, but would strip him of immunity where the person who is the object of attempted subornation seeks damages flowing from such action. The fundamental question remains the same. Did the activity occur while 'acting as an advocate in a judicial proceeding ...?'" Betts v. Richards, 726 F.2d 79 (2nd Cir., 1984).

WARRANTLESS SEARCH - AUTOMOBILE EXCEPTION - AIRPLANES - MOTOR HOMES

The automobile exception to the warrant requirement of the Fourth Amendment has been applied to airplanes. ". . . as with an automobile, the 'inherent mobility' of an airplane

WARRANTLESS SEARCH - AUTOMOBILE EXCEPTION - AIRPLANES - MOTOR HOMES (CONT.)

provides sufficient exigent circumstances to justify a warrantless search so long as there is probable cause to believe it contains contraband or evidence of a crime." The Court applied the exception even though in the instant case the airplane was immobilized and its pilot in custody prior to the search. "The automobile exception is founded on the fact that a motor vehicle is inherently mobile, and it makes no difference whether the vehicle could actually be used to remove evidence once officers have determined that they have probable cause to search it and have taken steps to prevent its departure." U.S. v. Nigro, 727 F.2d 100 (6th Cir. 1984).

Contrary to the holding of the California Supreme Court in People v. Carney, 668 P.2d 807 (1983) the Minnesota Supreme Court takes the position that the automobile exception to the Fourth Amendment warrant exception applies equally to motor homes as to automobiles. The exception's rationale is based upon the mobility of the motor vehicle and the diminished expectation of privacy that a person has in a motor vehicle as opposed to his home. In the present case the motor home was mobile and was being used as a motor vehicle. State v. Lepley, 343 N.W.2d 41 (Minn., 1984).

AUTOMOBILES - SEARCH INCIDENT TO ARREST - NEW YORK V. BELTON-LOCKED GLOVE COMPARTMENT

In New York v. Belton, 453 U.S. 454 (1981) the U.S. Supreme Court ruled that the incidental (to arrest) search of the passenger compartment of an automobile may include "closed or open glove compartments." An unanswered question has been whether Belton extends to locked glove compartments, as well as those that are merely "closed." The North Carolina Court of Appeals, while noting that "there is some difference between a locked glove compartment and a closed but unlocked one,' holds that "we do not believe the Supreme Court intended to make a distinction between them with respect to a search incident to arrest." State v. Massenburg, 310 S.E.2d 619 (N.C. App., 1984).

ESCAPE - DISORDERLY CONDUCT

Although a defendant may raise the unlawfulness of his custody as an affirmative defense in an escape prosecution, the State need not prove the lawfulness of the defendant's custody as an element of the offense of escape. All that the State must prove is that the defendant was a "prisoner." This was accomplished by a showing that he was carried on a jail log as a prisoner, had been booked, and wore prison clothing. State v. Williams, 444 So.2d 13 (Fla., 1984).

ESCAPE - DISORDERLY CONDUCT (CONT.)

While "police officers must expect complaints and even limited verbal abuse during the course of their duties," a defendant went too far and crossed into the unprotected zone of "fighting words" when he told policemen, "I'll get you mother f****rs, you son-of-a-b***hes. * * * F**k you pigs. * * * We're going to get your a**." The test for determining whether words constitute "fighting words" is whether using an objective standard, the words are used as a personal insult in language likely to provoke a violent reaction. Mesarosh v. State, 459 N.E.2d 426 (Ind.App., 1984).

STOP AND FRISK - REASONABLE SUSPICION - FURTIVE AND ELUSIVE CONDUCT - SCENE OF FREQUENT CRIMINAL CONDUCT

Police observations of an apparent drug transaction in progress on a street known for drug trafficking, and furtive, elusive conduct by the defendant as a police officer approached him, added up to reasonable suspicion for a stop and frisk. "When Defendant saw Officer Hall he abruptly turned away. As Hall got out of his automobile, the Defendant turned toward him holding the sack with his left hand while his right hand appeared to be holding something within the sack. The Defendant started moving toward a parked car and 'made a motion with the sack toward the window' of the car; Officer Hall then heard a metallic sound." When the defendant was told to halt he ignored this order, "complained of being harassed, and 'made a dip movement with his hand.' Officer Hall heard a sound as an object hit the ground and then saw a plastic vial rolling near the Defendant's right foot." Gipson v. State, 459 N.E.2d 366 (Ind., 1984).

Merely because defendant ran away from a dimly lit parking lot late at night where drug transactions were frequently carried out did not give a sufficient basis for a stop and frisk. The police officer in question made a regular practice of stopping everyone he found on the lot, a practice defendant was aware of and had sought to avoid, justifiably so according to the Court. People v. Aldridge, 674 P.2d 240 (Cal. 1984).

MASSIAH - USE OF INFORMERS

When the police placed a private detective disguised as an inmate into the defendant's cell in hopes of overhearing incriminating statements, which took place after formal judicial proceedings had begun, this was a classic violation of Massiah. It made no difference that the informer did not actually question the defendant and indeed said he wanted to sleep rather than talk. "In the instant case, [informer] Cookerly was selected in advance by the Sheriff and District Attorney to obtain information about Stokes' death. He was

MASSIAH - USE OF INFORMERS (CONT.)

placed in jail with appellant pursuant to such arrangment. This occurred after appellant was arrested and charged, and counsel had been appointed to represent him. In this manner, the Texas County Sheriff deliberately elicited incriminating words from appellant in violation of his Sixth Amendment right to counsel ... The informer's testimony was based on information surreptitiously obtained by prior arrangement with police, and should not have been admitted at trial." McCubbin v. State, 675 P.2d 461 (Okla., 1984).

MIRANDA - ABSENCE OF COUNSEL - FRUIT OF POISONOUS TREE - AMBIGUOUS STATEMENTS

When federal agents approached a house to investigate possible drug trafficking (based upon defendant's suspicious behavior and a strong odor of marijuana), they saw the defendant coming down some stairs, whereupon an officer drew his gun and asked, "What in the world is going on here?" The defendant replied, "You want money? We got money." Although this was a Miranda violation on its face, the answer was admissible because it was not responsive to the improper question, but was spontaneously volunteered, and it constituted "a deliberate attempt to commit a totally separate crime - bribery * * *." A voluntary declaration that has not been induced by a Miranda violation is admissible in its own right. U.S. v. Castro, 723 F.2d 1527 (11th Cir., 1984).

Where a defendant stated during questioning, "I think I might need a lawyer," this was not an exercise of the right to counsel. The Court stated: "a more definite invocation of the right to counsel should have been made in the instant case to effectively invoke the right to counsel." Interestingly, the police apparently thought that defendant was invoking his right to counsel because they stopped their interrogation of him temporarily after he made the statement. People v. Kendricks, 459 N.E.2d 1137 (Ill. App., 1984).

DOUBLE JEOPARDY - INCEST

The trial court violated the defendant's constitutional right against double jeopardy when it allowed the jury to convict him of both rape and incest resulting from one act of sexual intercourse with his 10-year-old daughter. The defendant received a life sentence for the rape and ten years for incest, with the sentences running consecutively. The two offenses were not sufficiently distinguishable because "the only additional fact - the relationship of father/daughter - was required in the incest charge." The court reversed the incest conviction. Hamilton v. Commonwealth, 659 S.W.2d 201 (Ky., 1983).

EXPERTS - WITNESSES

"As we view it, the presentation of expert testimony criticizing the presentation of the other side of the case is not appropriate." The trial court was correct under Rule 702 when it rejected expert testimony about the inadequacy of the police investigation techniques. Mason v. United States, 719 F.2d 1485 (10th Cir., 1983).

IMMUNITY - WITNESSES

A witness may be given immunity conditioned upon his truthful testimony. If a person testifies untruthfully, the testimony is not compelled and is not protected by the grant of use immunity. State v. Boeglin, 672 P.2d 643 (N.M., 1983)

PRIVILEGES - HUSBAND AND WIFE

The marital communications privilege extends only to communications between the spouses. The privilege did not allow defendant to prevent his wife from testifying that she observed LSD in the trunk of his car. United States v. Ferris, 719 F.2d 1405 (9th Cir., 1983).

PROSECUTORS - SELECTIVE PROSECUTION

Defendant claimed that he was selectively prosecuted contrary to DEA and U.S. attorney policy merely because he refused to cooperate with the police officers. Assuming what defendant said was true, such selective process was constitutionally permissible. United States v. Ross, 719 F.2d 615 (2nd Cir., 1983).

SERIOUS INJURY - JAW BONE

Defendant inflicted "serious injury," which is defined as "protracted loss or impairment of the function of any bodily member or organ," when he broke the jaw of the woman he was living with. The State's interpretation of their law was not "so unexpected, so outlandish, that no reasonable person cold have expected it." The jaw could be interpreted as a "member" or "organ" and six weeks with her jaw wired shut certainly must have seemed "protracted" to the victim. Welton v. Nix, 719 F.2d 969 (8th Cir., 1983).

WARRANTLESS ARREST - JUDICIAL AUTHORIZATION FOR TAKING FINGERPRINTS AND PHOTOGRAPHS

A warrant based upon a probable cause affidavit was properly used to arrest, fingerprint, and photograph a rape suspect, who was then immediately released by the police. The warrant specified the procedures to be performed, directed the police to immediately release the defendant upon completion of the photographing and fingerprinting session, and directed the photograph to be placed with others in a photographic array to be displayed to the victim. The reviewing Court, in approving the procedure, noted that there was "no evidence of interrogation, duplicate processes or any violation of the arrest warrant." The Court noted that in David v. Mississippi, 394 U.S. 721 (1969), the U.S. Supreme Court had intimated that judicially authorized procedures for obtaining a suspect's fingerprints would not offend the Fourth Amendent, even in the absence of probable cause to arrest the suspect. Baker v. State, 449 N.E.2d 1085 (Ind., 1983).

WARRANTLESS ARREST - JUDICIAL AUTHORIZATION FOR LINEUP

In this case the New Jersey Supreme Court ruled that a pre-arrest investigative detention for purposes of conducting a lineup need not be supported by probable cause, and that trial court judges have jurisdiction to issue orders for such lineups based upon their responsibility under the Fourth Amendment and the State Constitution to protect citizens' rights to be free from unreasonable searches and seizures. Relying upon David v. Mississippi, the Court takes the position that probable cause is not necessary for detentions "that do not entail significant intrusions upon individual privacy or freedom, are productive of reliable evidence, and can be effectuated without abuse, coercion or intimidation * * *." Such an order can be issued upon a showing that a crime has occurred, that the police have a well-grounded belief that the suspect may have committed the crime, and that the detention will significantly advance the investigation. To safeguard the suspect's rights in the process, he should be provided with sufficient notice of the proposed detention, the opportunity to arrange a convenient time, and the opportunity to have counsel present. State v. Hall, 461 A.2d 1155 (N.J., 1983).

SEARCH - WHAT CONSTITUTES - FORCING AIR OUT OF A SUITCASE

Where a police officer stood astride a suitcase and pressed his hands againsts its sides, thereby forcing air out so as to enhance the ability of a trained dog to detect any contraband inside, this was not a Fourth Amendment search and seizure. "We adopt the reasoning of U.S. v. Viera, 644 F.2d 509 (5th Cir. 1981), in recognizing that this type of investigative procedure is such a de minimis intrusion as not to constitute a search and seizure ***." Sprowls v. state, 433 So.2d 1271 (Fla. App., 1983).

STOP AND FRISK - REASONABLE SUSPICION - PROTECTIVE SEARCH OF MOTEL ROOM

Police officers responded to a report that a rape might be in progress in the defendant's motel room and that he had earlier been in possession of a pistol. They ordered him to open the door; the door then opened, and a woman walked out. From their vantage point outside the door, the officers could see the defendant in the room. The officers then entered, observed a holster on the bed, restrained the defendant, and conducted a search that uncovered a pistol and drugs. The Court ruled that the entry and search were based only on a reasonable suspicion, and although such was sufficient for an investigatory stop and frisk, it was not sufficient to support the entry and search of the motel room. The Court declined to approve an extension of a Terry-type search "into the private recesses of one's dwelling when an officer stands at the threshold with merely reasonable suspicion to support an investigation." Additionally, the Court rejected the exigent circumstances exception to the warrant because once the woman had left the room there was no need to render aid to anyone, nor were the officers personally in danger. State v. Davis, 666 P.2d 802 (Ore., 1983).

RIGHT TO PRIVACY - REASONABLE EXPECTATION - GARBAGE BAGS-TRESPASS

No violation of defendant's constitutional rights was committed by the police in seizing and opening a defendant's sealed garbage bags to obtain records of drug transactions even if they entered his yard or reached over a low fence surrounding the yard to remove the bags. Such a "slight trespass" would not adversely affect any reasonable and legitimate expectation of privacy protected by the Fourth Amendment. Many courts have held that the Fourth Amendment does not protect against the search and seizure of discarded garbage, but here the Court had to also consider the apparently slight trespass to the defendant's property. The trespass, however, would not rise to the level of a violation of the Fourth Amendment unless it infringed some interest the Fourth Amendment was intended to protect. The Court identified three interests of the defendant that would be protected by the Fourth amendment - peace and quiet, relaxing in his home without public scrutiny, and protection of his public esteem. No violation of the Fourth Amendment occurred where none of these interests were infringed by the surreptitious seizure of the defendant's garbage from his property. The trespass that occurred was de minimis: "not every government trespass violates the Fourth Amendment." U.S. v. Kramer, 711 F.2d 789 (7th Cir., 1983).

CONSTRUCTIVE POSSESSION - DOMINION OR CONTROL - POSSESSION OF KEYS TO VAN

The Third Circuit Court of Appeals has held that "constructive possession" of a controlled substance may be established by a showing of "ownership, dominion or control" over the contraband or a vehicle concealing it, while "dominion or control" means the ability to reduce a controlled substance to actual possession. The Court held that a defendant who masterminded a conspiracy to possess and distribute a controlled substance came into constructive possession of it at the moment he obtained the keys to a van into which the substance had been placed by government agents. The facts showed that the defendant arranged to purchase 52 gallons of a controlled substance from a federal informer. After being paid by the defendant, the informer delivered the keys to a padlocked van containing the substance. The defendant then gave the keys to an associate, who entered the van with the intention of driving it away. FBI agents and police who had the van under surveillance arrested the associate before he could start the van. The defendant was convicted of possessing the controlled substance and of conspiracy to possess and distribute it. The Court ruled that the defendant clearly had dominion over the contents of the van, if only briefly. The law enforcement agents did not have to permit the conspirators to escape with the controlled substance before a possession charge would be appropriate. U.S. v. Mortorano, 709 F.2d 863 (3rd Cir., 1983).

WITNESS - IMPEACHMENT - PRIOR TESTIMONY - USE OF AUDIO RECORDINGS

The Supreme Judicial Court of Massachusetts has ruled that the best way to present the prior testimony of a witness for impeachment purposes is through an audio recording rather than a transcript, and such recordings may not be refused by trial courts merely because the testimony is not presented in the traditional typewritten form. The Court set out seven conditions for admission of such evidence, including authentication, audibility of the recording, and editing for relevance. At the same time the trial court has the discretion to require a typewritten transcript. The proponent of a recording must supply the necessary equipment, and if the proponent chooses, prior testimony may still be presented in more traditional fashions. The Court was impressed with the accuracy, relative inexpensiveness, and easy usage of audio recordings. Commonwealth v. Gordon, 450 N.E.2d 572 (Mass., 1983).

PROSECUTING ATTORNEY - RECUSAL - STANDARD - APPEARANCE OF CONFLICT

The Supreme Court of California has held that a trial court properly recused an entire office from prosecuting a defendant on criminal charges arising from an escape attempt during which a deputy district attorney was almost shot. In doing so, the Court, in effect, used a standard of "apppearance of conflict." A California statute provided for recusal in cases where a conflict "would render it unlikely that the defendant would receive a fair trial," but the Court interpreted the statute to mean that recusal is necessary whenever there is a reasonable possibility that a prosecutor's office may not exercise its discretionary function in an even-handed manner. The Court was fearful that no deputy prosecutor in the office would be immune from the emotional involvement engendered by their colleague's harrowing experience. People v. Conner, 666 P.2d 5 (Cal., 1983).

Drawing by Handelsman; ©1978 The New Yorker Magazine, Inc.

"If the larceny charge can be dropped, my client is prepared to plead guilty to the lesser charge of creating a climate of larceny."

EXCLUSIONARY RULE - GOOD-FAITH EXCEPTION - CONFESSION OBTAINED AFTER INVALID ARREST

In U.S. v. Williams, 622 F.2d 830 (1980), the Fifth Circuit Court of Appeals launched a judicial revolution in adopting a good-faith exception to the Exclusionary Rule in warrantless search cases. Now the Court has taken a logical next step in holding that a defendant's statements made after his arrest pursuant to an invalid arrest warrant need not have been suppressed in view of the executing officers' good-faith, reasonable belief that the warrant was valid. The Court restated its rationale first adopted in Williams, that the Exclusionary Rule ceases to have a deterrent effect where the police have acted in the reasonable, if mistaken, belief that their actions are lawful. The trial court had found that the arresting officer had a subjective, good-faith belief in the lawfulness of his actions, and the Fifth Circuit added that this belief was properly "grounded upon objective reasonableness," the linchpin of the Williams rule. If the police subjectively did not know, and reasonably could not know, that their actions would later be invalidated, "the marginal increment in deterrence that could be achieved by applying the Exclusionary Rule does not justify the societal costs of denying the jury access to Mahoney's confession." The Court stated: "Williams teaches that the exclusionary rule is not to be applied 'in those contexts where it does not effectively deter official misconduct.' 622 F.2d at 842. We are persuaded that this is such a case. As we explained, because the officers neither knew nor should have known that their actions later would be invalidated, there is no specific deterrent value in suppressing this confession. * * * [I]f these officers have acted in good faith measured both objectively and subjectively, we are uncertain what suppression of Mahoney's confession is calculated to deter the officers from doing in the future. Arguably the officers would have the incentive to learn more. That explanation will not wash, however, because we have posited that their conduct was objectively reasonable. If the violated principle was so bright lined as to be the subject of police lecture, finding the good faith to have been reasonable would be sorely taxed. As we state in Williams, we do not reward ignorance. * * * [par.] We question on these facts the claimed teaching value of the exclusionary rule." U.S. v. Mahoney, 712 F.2d 956 (5th Cir., 1983).

WITNESSES

The Supreme Judicial Court of Massachusetts in Commonwealth v. Jones, 362 Mass. 497 (1972), had held that a trial court hearing a case without a jury had discretion to exclude testimony of a psychologist and a psychiatrist concerning the capacity of identification witnesses to observe accurately and remember correctly. The Court now holds that trial judges have the same discretion to exclude this sort of testimony in cases tried to a jury, for the reason that it intrudes into an area "traditionally and exclusively the function of the jury." Commonwealth v. Francis, 453 N.E.2d 1204 (Mass. 1983)

CONTRABAND IN PLAIN VIEW

On the basis of Texas v. Brown, 103 S.Ct. 1535 (1983), a police officer who shone his flashlight through the window of an occupied van parked in a public parking lot and observed a baggie that he believed to contain marijuana properly entered the vehicle and seized the apparent contraband without a warrant. Not only was the view not a violation of the defendant's right to privacy, but the warrantless seizure was based upon exigent circumstances. Moreover, since the officer made the observation from a place where he had a right to be - and violated no constitutional right of the defendant when he was in that vantage point, his motive - even if it was to discover evidence of a crime - was irrelevant. State v. Harriman, 467 A.2d 745 (Me., 1983).

MASSIAH - POST-INDICTMENT STATEMENTS CONCERNING A NEW CRIME

Massiah v. U.S., 377 U.S. 201 (1964) does not protect an indicted defendant in jail from incriminating statements he made to a jail visitor, in the absence of counsel, about a plan to tamper with the jury. ". . . . the right to counsel does not attach when the statements either concern other criminal acts or actually constitute separate criminal conduct as they do here. [Defendant's] statements to [the witness] constituted the crime of suborning perjury. Massiah v. U.S. . . . was never intended to provide the petitioner with immunity for such criminal activity." Cases reaching the same conclusion are collected in the Court's opinion. Mealer v. Jones, 573 F. Supp. 675 (N.Y., 1983).

WITNESS - EXPERT - BATTERED CHILD SYNDROME - BATTERED WOMAN SYNDROME

Utah joins the growing number of states permitting expert medical testimony on the "battered child syndrome," when given by a properly qualified expert witness. State v. Tanner, 675 P.2d 539 (Utah, 1983).

One Court has held that expert testimony on the "battered woman syndrome" is admissible not only on the issue of the defendant's state of mind, but also to explain the defendant's actions after she killed her spouse. The later use of the evidence would have helped the defendant rebut the State's argument that her dismemberment of her husband's body and disposal of the pieces after the killing showed a "consciousness of guilt." People v. Minnis, 455 N.E.2d 209 (Ill. App., 1983).

PROSECUTION ARGUMENT - DISPARAGING THE DEFENSE - PERSONAL SANCTIONS

A prosecutor committed error by references in his closing argument to defendant's defense of lack of intent due to intoxication, that included such phrases as "a very common excuse," "red herrings," and "smoke screens." After noting that a defendant has the right to raise available defenses, the Court stated that such characterizations ". . .were clearly designed to awaken in the jury a suspicion that the defenses were merely a subterfuge employed by the defendant to evade responsibility for his acts. Such tactics create the danger that a verdict may be rendered based on impermissible criteria." State v. McDonald, 472 A.2d 424 (Me. 1984).

Improperly exposing a defendant's prior criminal convictions, attacking his character, questioning his reasons for remaining silent, belittling defense counsel, compromising the impartiality of a jury, ignoring trial court rulings, and indicating personal belief in a defendant's guilt, earned a prosecutor not only a reversal, but a fine payable to the county law library book fund. "[I]t is an intolerable affront to the criminal justice system, the state and its citizens that the type of egregious conduct outlined in part in this opinion be allowed to occur in our courtrooms. The waste and diversion of limited judicial and human resources are but some of the inevitable consequences of such behavior. Another is the danger that youthful prosecutors may * * * be persuaded that emulation and perpetration of such conduct may be both effective and acceptable." McGuire v. State, 677 P.2d 1060 (Nev., 1984).

SEARCH WARRANTS - PROBABLE CAUSE - ILLINOIS V. GATES - TIMELINESS

Under Gates an affidavit for a search warrant that was based upon a sworn statement from the suspect's estranged wife that was strong on "basis of knowledge," but weak on "veracity" (the Court would not treat her the same as a "eyewitness-bystander" because of her estrangement from her husband) was sufficient to establish probable cause. ". . . the strong showing of the informer's basis of knowledge makes this precisely the sort of case that the Gates majority outlined in an example . . ." U.S. v. Phillips, 727 F.2d 392 (5th Cir., 1984).

A search warrant affidavit based upon a confidential informer's statements passed muster under Illinois v. Gates, even though it failed to indicate the times or dates of alleged drug purchases from the defendant, but merely stated that on four prior instances the defendant had sold the informer LSD and marijuana at his residence. The Court stated that although "[t]ime is assuredly an element of the

SEARCH WARRANTS (CONT.)

concept of probable cause * * *, the precise date of an occurrence is not essential. * * * When the affidavit indicates the existence of an ongoing scheme to sell drugs, the passage of time becomes less significant than would be the case with a single, isolated transaction." State v. Luck, 312 S.E.2d 791 (Ga., 1984).

file

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August 7, 1984

Mr. Marc Racicot
County Prosecutor's
Service Bureau
Justice Building
215 North Sanders
Helena, MT 59620

Re: Law Enforcement Quarterly

Dear Marc:

You received a copy of the Law Enforcement Quarterly which I left at the registration desk at the convention. We attempted to make sure that they were evenly distributed amongst all the attendees at the County Attorney's Convention.

The purpose of my letter is to ask you to insert in our next newsletter that the Law Enforcement Quarterly is looking for input for their magazine. They would appreciate having County Attorneys submit articles or other data which may be of interest to County Attorneys and other law enforcement agencies and officers.

If you would be so kind to do so it would be appreciated.

Sorry I could not be at the convention for the full three days, but there is always next year.

Best wishes.

Very truly yours,

Ron

Ronald W. Smith
Hill County Attorney

RWS/dd

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AUG 09 1984
COUNTY PROSECUTOR SERVICES
Helena, Montana